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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D. Noland, Jr., et al.,

13 Defendants.
14

No. CV-20-00047-PHX-DWL

ORDER

15 Pending before the Court are two related motions: (1) the Individual Defendants'
16 motion to exclude the FTC's claim for monetary damages as a Rule 37 sanction based on
17 the FTC's purported failure to disclose its damages methodology and computations (Doc.
18 482); and (2) the FTC's motion for leave to file a sur-reply (Doc. 503). Both motions are
19 fully briefed (Docs. 495, 501, 505) and neither side requested oral argument. For the
20 following reasons, both motions are denied.

21 I. The Motion To Exclude

22 A. **Relevant Background**

23 As the parties are aware, the FTC has asserted claims in this action against the
24 Individual Defendants under both § 13(b) and § 19 of the FTC Act. In March 2020, during
25 the early stages of the case, the FTC informed the Individual Defendants that it would be
26 seeking monetary damages based on its § 13(b) claims, calculated those damages to be at
27 least \$4,759,554.81, and disclosed its methodology for arriving at that calculation. (Doc.
28 482-1 at 15.)

1 On December 23, 2020, which was the last day of the fact-discovery period (Doc.
2 211), the FTC updated its disclosures to clarify that its damages estimate for its § 13(b)
3 claims had increased to \$7,101,132.40 and that it was also seeking monetary damages
4 based on its § 19 claims. (Doc. 482-1 at 35-38.) More specifically, the FTC disclosed that
5 it was seeking \$539,644.50 in § 19 damages based on the Individual Defendants' violations
6 of the Merchandise Rule and an additional \$506,338.50 in § 19 damages based on the
7 Individual Defendants' violations of the Cooling-Off Rule. (*Id.*) These calculations were
8 accompanied by detailed explanations of how the FTC derived each figure. (*Id.*) The
9 \$539,644.50 in Merchandise Rule damages amounted to "all of Defendants' revenues from
10 sales for which the product sold was shipped more than 30 days after purchase (or after
11 any other clearly and conspicuously disclosed shipment date), less any chargebacks,
12 refunds, or commissions already paid to the purchaser that Defendants are able to
13 specifically attribute to any of these delayed orders" and were composed of \$370,130
14 arising from late-shipped Founders Pack orders, \$27,284 arising from late-shipped rooibos
15 tea orders, \$44,157 arising from late-shipped hot cocoa orders, \$25,322.50 arising from
16 late-shipped chai tea orders, \$47,955 arising from late-shipped time capsule orders, and
17 \$24,796 arising from late-shipped G-HCBD AM/PM orders. (*Id.*) Additionally, the FTC
18 disclosed that its Merchandise Rule damages estimate was "likely to increase, perhaps
19 substantially, in a future . . . supplement" because "the FTC has not yet been able to
20 calculate the total amount of all delayed G-FYX shipments, nor has it identified all gaps in
21 inventory availability that would have led to additional shipment delays." Meanwhile, the
22 \$506,338.50 in Cooling-Off Rule damages amounted to "all of Defendants' revenues from
23 sales of SBH or SBM products or services (including event tickets) that occurred either (1)
24 at the purchaser's home and exceeded \$25 or (2) at any location other than SBH or SBM's
25 primary place of business (for example, at hotel meeting rooms or convention centers) and
26 exceeded \$130" and the FTC advised that this figure was "likely to increase, perhaps
27 substantially, in a future . . . supplement" because "the FTC has not yet determined which
28 orders were placed at events (such as CTMs or other smaller gatherings) other than the

1 major events described above.” (*Id.*)

2 In April 2021, the Supreme Court held in *AMG Capital Mgmt., LLC v. FTC*, 141
3 S. Ct. 1341 (2021), that the FTC may not seek monetary remedies under § 13(b) of the FTC
4 Act. Following that ruling, the FTC clarified that it would only be seeking monetary
5 remedies in this action based on its § 19 claims. (Doc. 351.)

6 To that end, after the FTC obtained a grant of summary judgment in its favor on the
7 issue of liability (Doc. 406), it moved for summary judgment on the issue of monetary
8 remedies with respect to its § 19 claims. (Doc. 365.) In that motion, the FTC relied on the
9 same damages methodology it has disclosed to the Individual Defendants in December
10 2020. Specifically, as for the Merchandise Rule violations, the FTC again sought damages
11 based on late-shipped orders for Founders Packs, rooibos tea, hot cocoa, chai tea, time
12 capsules, and G-HCBD AM/PM. (*Id.* at 2-4.) Although the overall amount of Merchandise
13 Rule damages sought in the summary judgment motion (\$630,377) was slightly higher than
14 the figure disclosed in December 2020 (\$539,644.50), the increase did not arise from a
15 change in the FTC’s methodology but simply from the identification of more late-shipped
16 orders for hot cocoa, rooibos tea, chai tea, and G-HCBD AM/PM than had previously been
17 identified. (*Id.*) Similarly, as for the Cooling-Off Rule violations, although the amount of
18 damages sought in the summary judgment motion (\$526,488.50) was slightly higher than
19 the figure disclosed in December 2020 (\$506,338.50), the methodology was the same. (*Id.*
20 at 7-10).

21 On November 23, 2021, the Court issued an order denying the FTC’s motion for
22 summary judgment as to §19 monetary remedies. (Doc. 438.) In a nutshell, the Court
23 concluded that “the all-or-nothing methodology presented in the FTC’s motion papers
24 [with respect to the Merchandise Rule violations] is flawed because it fails to account for
25 the inherent value of the product that consumers ultimately received, even if the product
26 was shipped late” and that the methodology underlying the FTC’s claim for Cooling-Off
27 Rule damages was flawed for similar reasons: “[T]he fundamental problem with the FTC’s
28 damages methodology is that it fails to account for the inherent value of the products and

1 services received by consumers, thereby creating a windfall. . . . [The FTC] seeks to secure
2 a monetary award that would allow each consumer to recoup the full purchase price while
3 retaining the underlying goods and services.” (*Id.* at 7, 14.)

4 **B. The Parties’ Arguments**

5 The Individual Defendants contend that the FTC has not disclosed any new damages
6 calculations or a new damages methodology since the issuance of the November 2021
7 summary judgment order. (Doc. 482 at 4.) The Individual Defendants also contend that
8 “any attempt by the FTC to create a damages theory pursuant to its [§ 19] rule violations
9 would require substantial discovery, depositions and analysis of damages.” (*Id.* at 8.)
10 Thus, the Individual Defendants argue that, under Rules 26 and 37 of the Federal Rules of
11 Civil Procedure, “the Court [should] exclude all damages related to or concerning the
12 FTC’s claims under Section 19 of the FTC Act.” (*Id.* at 10.)

13 The FTC opposes the Individual Defendants’ motion. (Doc. 495.) The FTC
14 contends that no disclosure violation has occurred—and thus sanctions are unavailable
15 under Rules 26 and 37—because it provided a timely, detailed disclosure of its § 19
16 damages computations to the Individual Defendants in December 2020 and intends to rely
17 on the same methodology and computations at trial. (*Id.* at 1-3.) The FTC contends that
18 the Individual Defendants’ “actual argument appears to be that the FTC cannot prove, or
19 is not otherwise entitled to recover, the disclosed monetary relief” and argues that because
20 the “Individual Defendants did not move for summary judgment, . . . the FTC’s ability to
21 prove the proper amount of monetary relief is therefore a question for trial.” (*Id.*) In an
22 abundance of caution, the FTC then provides a detailed explanation of why it believes it
23 will prevail on its disclosed theory of damages at trial, notwithstanding the comments in
24 the November 2021 summary judgment order. (*Id.* at 4-17.)

25 In reply, the Individual Defendants begin by accusing the FTC of seeking
26 reconsideration of the November 2021 summary judgment order and argue that various
27 findings in that order constitute “the law of the case.” (Doc. 501 at 1-3.) Next, the
28 Individual Defendants argue that the FTC’s previous disclosures were inadequate because

1 they failed to identify the individual consumers who were purportedly harmed by the
 2 Merchandise Rule and Cooling-Off Rule violations. (*Id.* at 4-5.) According to the
 3 Individual Defendants, it would constitute trial by ambush to allow the FTC to identify
 4 such consumers for the first time at trial. (*Id.*) Next, the Individual Defendants seek to
 5 distinguish some of the cases cited in the portion of the FTC’s brief defending the merits
 6 of its damages methodology. (*Id.* at 6-7.) Next, the Individual Defendants take issue with
 7 the FTC’s arguments regarding SBH’s purportedly poor records related to refund requests
 8 and shipping delays, arguing that they maintained various systems for tracking those issues
 9 that were dismantled by the receiver. (*Id.* at 7-9.) Next, the Individual Defendants argue
 10 that the FTC’s “no inherent value” theory should be rejected because it was not properly
 11 disclosed and is foreclosed by the Ninth Circuit’s decision in *Figgie*. (*Id.* at 9.) Finally,
 12 the Individual Defendants identify various reasons why the FTC’s methodology for
 13 calculating Cooling-Off Rule damages should be rejected on the merits. (*Id.* at 10-11.)

14 C Legal Standard

15 As noted, the Individual Defendants seek the imposition of an exclusion sanction
 16 under Rules 26 and 37 of the Federal Rules of Civil Procedure. (Doc. 482 at 1, 10.) The
 17 Individual Defendants do not, however, specify which subdivision of Rule 37 gives rise to
 18 their sanction request.

19 The relevant provision here is likely Rule 37(b) rather than Rule 37(c)(1). This is
 20 because this case was filed in January 2020 and is thus subject to the District of Arizona’s
 21 Mandatory Initial Discovery Pilot Project (“MIDP”), which applies to most civil cases filed
 22 between May 1, 2017 and May 1, 2020. *See* D. Ariz. G.O. 17-08. Among other things,
 23 the MIDP requires each party to “[p]rovide a computation of each category of damages
 24 claimed by you . . . and a description of the documents or other evidentiary material on
 25 which it is based, including materials bearing on the nature and extent of the injuries
 26 suffered.” *Id.* ¶ B(5). The MIDP further provides that “[t]he discovery obligations
 27 addressed in this General Order supersede the disclosures required by Rule 26(a)(1) and
 28 are framed as court-ordered mandatory initial discovery pursuant to the Court’s inherent

1 authority to manage cases.” *Id.* at 1. *See also id.* ¶ A(2) (“The responses are called for by
 2 the Court, not by discovery requests actually served by an opposing party.”). Accordingly,
 3 a request for sanctions based on the failure to disclose information required by the MIDP
 4 (including damages computations) is likely governed by Rule 37(b)(2)(A), which
 5 authorizes the imposition of sanctions for “fail[ing] to obey [a court] order to provide or
 6 permit discovery,” rather than Rule 37(c)(1), which authorizes the imposition of sanctions
 7 against “a party [that] fails to provide information ...as required by Rule 26(a) or (e).”¹

8 Nevertheless, regardless of whether the Individual Defendants’ request is governed
 9 by Rule 37(b) or Rule 37(c)(1), they bear the initial burden of demonstrating that the FTC
 10 failed to comply with the applicable disclosure requirement. *SiteLock LLC v.*
 11 *GoDaddy.com LLC*, 2021 WL 2895503, *5-6 (D. Ariz. 2021).

12 D. Discussion

13 The FTC has clarified that it intends to rely at trial on the same § 19 damages
 14 methodology and computations that it timely disclosed to the Individual Defendants in
 15 December 2020 and then advanced during the summary judgment process. To the extent
 16 the Individual Defendants believe that the FTC’s plan to establish, at trial, that certain
 17 consumers were harmed by the Rules violations constitutes a change to the FTC’s disclosed
 18 methodology, the Court disagrees. The FTC has consistently stated that it seeks to recover,
 19 as damages, all revenues associated with certain transactions tainted by Rules violations
 20 and the anticipated consumer-harm evidence is consistent with that theory (and has no
 21 effect on the FTC’s bottom-line damages computations).

22 For these reasons, there has been no disclosure violation that might give rise to the
 23 imposition of an exclusion sanction under Rule 37(b) or Rule 37(c)(1). Although the
 24 parties spill much ink debating whether the FTC will ultimately be able to prevail on its
 25 § 19 damages theory at trial, that issue is not properly before the Court at this juncture—

26 ¹ Rule 26(a)(1)(A)(iii) requires the disclosure of “a computation of each category of
 27 damages claimed by the disclosing party—who must also make available for inspection
 28 and copying . . . the documents or other evidentiary material, unless privileged or protected
 from disclosure, on which each computation is based.” Thus, a failure to disclose damages
 computations is ordinarily (*i.e.*, in cases not governed by the MIDP) treated as a violation
 of Rule 26(a) that is sanctionable under Rule 37(c)(1).

1 the summary judgment deadline expired long ago and the only relief sought in the
 2 Individual Defendants' motion is an exclusion sanction under Rule 37 based on late
 3 disclosure. Had the FTC attempted to formulate a new damages methodology in the wake
 4 of the November 2021 summary judgment ruling, Rule 37 might be implicated, but the
 5 FTC has not done so.

6 II. The Motion For Leave To File A Sur-Reply

7 As noted above, one section of the Individual Defendants' reply brief discussed
 8 SBH's records related to refund requests and shipping delays. (Doc. 501 at 7-9.)

9 The FTC has filed a motion for leave to file a sur-reply addressing those arguments.
 10 (Doc. 503.) The FTC contends that, because its response brief "made no mention of
 11 Individual Defendants' customer-support ticketing system" and the reply brief's discussion
 12 of this system contains "misstatements . . . which [the Individual Defendants] have refused
 13 to correct," it should be given an opportunity to set the record straight. (*Id.* at 1.) To that
 14 end, the FTC has submitted a proposed sur-reply. (Doc. 504.) The Individual Defendants
 15 oppose the FTC's request, arguing that the statements in the reply brief regarding the
 16 ticketing system were properly raised in response to arguments in the FTC's response brief.
 17 (Doc. 505.) The FTC did not file a reply in support of its request.

18 The FTC's motion is denied for the simple reason that the Court did not rely on the
 19 statements in the reply brief regarding the ticketing system when resolving the Individual
 20 Defendants' request for an exclusion sanction under Rule 37. Thus, there is no need to
 21 authorize further briefing on that issue.

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2 Accordingly,

3 **IT IS ORDERED** that:

- 4 1. The Individual Defendants' motion for sanctions (Doc. 482) is **denied**.
5 2. The FTC's motion for leave to file a sur-reply (Doc. 503) is **denied**.

6 Dated this 29th day of June, 2022.
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11 Dominic W. Lanza
12 United States District Judge
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